

PRODUCERS BANK OF THE PHILIPPINES, PETITIONER, VS. COURT OF APPEALS, NEW COTTON (PHIL.) CORP., LAN SHING CHIN, SHIN MAY WAN AND NELSON KHO, RESPONDENTS.

G.R. No. 125468. October 09, 2000

Ponente: QUISUMBING, J.

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QUISUMBING, J.:

This petition for review on certiorari seeks the reversal of the decision of the Court of Appeals dated June 19, 1996, which affirmed the decision of the Regional Trial Court of Makati, Branch 139, in Civil Case No. 88-2662, dismissing the complaint.

The issues raised before this Court are purely procedural. Did the appellate court err in affirming the trial court's ruling that the complaint ought to be dismissed for failure to prosecute? Should the dismissal be with or without prejudice?

The facts, as found by the trial court and by the Court of Appeals, are as follows: On December 9, 1988, Producers Bank of the Philippines filed a complaint with prayer for preliminary attachment against New Cotton (Phil.) Corporation concerning a loan of three million pesos. The bank alleged that on March 22, 1988, private respondent Lan Shing Chin, New Cotton's president, issued Promissory Note No. PC 015/88, for said amount. As agreed by the parties, the loan would mature in 55 days, or on May 16, 1988. It was renewed once, with maturity on July 15, 1988. Private respondents allegedly failed to pay the loans on their due dates.[1] Hence the complaint was filed before the Regional Trial Court, Branch 139, Makati. The court issued an order dated January 3, 1989,[2] granting the writ. It approved the attachment bond on February 6, 1989. Later, the court recalled its order dated February 6, 1989[3] approving the bond.

On June 7, 1989, petitioner filed a motion for the issuance of summons, which the trial court granted. Only private respondent Wilson Kho was served summons through substituted service. The whereabouts of the other defendants were unknown. The corporation had already ceased operations. Lan Shing Chin and Shin Man Wan, the two other defendants who were not Filipinos, were reportedly already in Hongkong.

Only Kho filed an answer, received by the trial court on July 21, 1989.[4] Kho denied the genuineness and due execution of the surety (bond) agreement guaranteeing the six million peso loan of New Cotton, claiming that he never signed nor authorized anyone to sign the surety in his behalf. He avers that the signature appearing on the surety agreement was a forgery.

On February 27, 1990, petitioner filed a motion to reinstate the order of attachment,[5] which was opposed by private respondent Kho. The motion was set for hearing on April 27, 1990. At the hearing, the trial court noted that there was no return of service of the summonses to New Cotton, Lan Shing Chin and Shin May Wan. The trial judge deferred consideration of the motion until said summonses were duly served.

On June 22, 1990, Kho filed a manifestation and motion alerting the trial court that trial had not yet commenced

one and a half years since the case was filed. Kho moved for scheduling of pre-trial conference and thereafter trial, without having to await for the return of the service of summonses.

On June 28, 1990, the trial court denied private respondent Kho's motion and ordered the court's process server to immediately serve the summonses on the other three respondents. The summonses, however, remained unserved.

On July 6, 1990, petitioner filed a motion for service of summons by publication against aforesaid respondents. One year and seven months had lapsed since the complaint was filed, and over one year since petitioner knew summonses could not be served personally or by substituted service. On August 14, 1990, the court granted petitioner's application for service of summons by publication. The summonses and a copy of the complaint were published in *The Philippine Star*.

On November 20, 1990, Kho moved to dismiss the complaint for failure to prosecute. The same was denied by the court in an order dated March 21, 1991, which also set for April 16, 1991, the hearing for the reinstatement of the writ of preliminary attachment.

On June 3, 1991, the trial court granted petitioner's application for preliminary attachment but only as against New Cotton Corp., Lan Shing Chin and Shin May Wan. It denied attachment as to Kho.

The case was set for pre-trial conference on August 13, 1991. On August 3, 1991, the court re-set the conference for September 17, 1991, since petitioner bank and its counsel could not be present. On August 5, the bank filed a motion to re-set pre-trial conference to either September 11, 13 or 17. The trial court re-set it for September 17. On August 14, Kho filed his pre-trial brief. On September 17, Kho's counsel attended but petitioner and its counsel did not, despite the fact that the date for the conference was upon their motion. The conference was re-set for October 22. On October 11, petitioner filed its pre-trial brief with corresponding request for implied admission of facts by respondent. On October 22, respondent moved, that in view of the bank's implied admission of the facts contained in the request for admission, incorporated in Kho's pre-trial brief, specifically for failure to answer within the period provided for in Rule 26 of the Rules of Court, Kho asked that he be allowed to present, his evidence to support his claim for damages, without the court receiving petitioner's evidence. The court issued an order granting the motion.

On November 19, 1991, a month after said order was issued, petitioner filed a motion for reconsideration. It was opposed by respondent on November 26. Thereafter, a reply and then a rejoinder followed. On April 14, 1992, the lower court despite clear provision on the Rules of Court on implied admissions, issued an order reversing its order of October 22, 1991. It also ordered continuation of the pre-trial. On May 8, petitioner again filed another motion to re-set the continuation of the pre-trial on May 28 to June 30, July 8 or 16, 1992. This was the second motion for postponement of the pre-trial by petitioner. On May 28, the lower court issued an order granting petitioner's motion to re-set pre-trial conference for July 16, 1992. Respondent averred that because of the re-setting to the said date which conflicted with respondent's prior scheduled appearance in another court, respondent was constrained to move for re-setting to July 29, 1992. On July 13, petitioner filed a manifestation and motion that the pre-trial set for July 16 be re-set for August 18, 19 and 25. The court re-set the same for September 2, 1992, which was again in conflict with respondent counsel's schedule, constraining the latter to ask that it be re-set for September 15. The court re-set the pre-trial conference on October 20. On October 20, after the petitioner and private respondent failed to arrive at an amicable settlement and after they had defined the issues, the lower court issued an order terminating the pre-trial. The petitioner's presentation of evidence was scheduled on January 21, 26, 28 and February 4, 9, 11, 16 and 18, 1993, all at 8:30 a.m., while the presentation by respondents of their evidence was scheduled on March 4, 9, 11, 16, 18, 23, 24 and 30, 1993. In all, pre-trial took one year and seven months.

Even before trial began, on January 18, 1993, petitioner filed an urgent motion to reset scheduled hearings on January 21, 26, 28 and February 4, 1993, to February 9. It explained that its principal witness, Luis L. Co, was still abroad on a business trip, and two other witnesses were unavailable. Kho did not object.

On January 23, the lower court issued an order granting the motion to re-set. It re-scheduled the hearings for February 9, 11, 16, and 18, with stern warning that should petitioner fail to present its evidence on said date, the court would consider petitioner's right to present evidence waived.

Before the scheduled hearing on February 9, 1993, despite stern warning from the court, petitioner filed its fourth motion for postponement, praying that the scheduled hearing on February 9, 1993 be reset to March 4, 1993. It explained that Co, its principal witness, faxed that he would not be available on the date of hearing since he would just be arriving then; that Ms. Joan T. Chan, whose whereabouts was previously unknown, went abroad for a vacation; and that Atty. Salvador Hababag, the notary public who notarized the surety agreement, asked to be presented on a much later date because of prior commitments. Petitioner likewise prayed that all scheduled hearing dates prior to March 4, 1993 be re-set. Respondent interposed no objection. The lower court issued an Order re-setting the presentation of evidence for the petitioner on March 4, 16, 18, 23, 25 and 30.

On March 2, 1993, it was respondent's counsel who moved for postponement of the trial, except those scheduled for March 9 and March 11, to June 22, July 13, 15, 21, 22, and 27. Respondent explained that his counsel had prior court commitments and would be out of the country for the entire month of May and first two weeks of July. Recall that March 4, 1993 was agreed upon by both counsels during their October 20, 1992 end of pre-trial conference. Note also that the motion for postponement by respondent was triggered by the re-scheduling of previous hearings on motion of petitioner.

Acting on the motion of the private respondent and without objection on the part of the petitioner, the lower court issued an order resetting the presentation of petitioner's evidence to July 13, 15, 20 and 27, 1993.

On June 24, 1993, petitioner's counsel filed a motion for postponement of the hearings scheduled on the aforesaid days. He cited as reason his having to leave for the province to arbitrate a peaceful settlement of a land dispute among members of his family. In his stead, he sent Atty. Leopoldo Cotaco, Assistant Vice President for the Department of Security and Internal Affairs, to attend the hearing and to inform the court about petitioner's counsel's predicament. Respondent opposed any further postponements and undue delays. He prayed for the dismissal of the case.

On July 13, 1993, the lower court finding no merit in the reasons for postponement and finding respondent's opposition well taken, issued an order dismissing the complaint for failure of the petitioner to prosecute the case.

On August 10, 1993, almost a month from the court's dismissal of the case, petitioner filed its motion for reconsideration. It was denied for lack of merit on November 9, 1993.

Petitioner appealed to the Court of Appeals.

On June 19, 1996, the Court of Appeals issued the assailed decision, dismissing the appeal and affirming the order of the lower court. The dispositive portion of its decision reads:

WHEREFORE, the appeal is hereby DISMISSED. The appealed order of the Regional Trial Court is hereby AFFIRMED en toto. Costs against appellant.[6]

Hence, this instant petition in which petitioner avers that,

THE COURT OF APPEALS ERRED IN NOT FINDING THAT THE LOWER COURT COMMITTED AN ABUSE OF DISCRETION IN DISMISSING THE CASE FOR FAILURE TO PROSECUTE.

ASSUMING ARGUENDO THAT THE ACTION MAY BE DISMISSED, THE COURT OF APPEALS ERRED IN NOT RULING THAT THE DISMISSAL SHOULD BE WITHOUT PREJUDICE TO THE FILING OF ANOTHER ACTION.[7]

The trial court in dismissing the complaint, and the appellate court in affirming the trial court, applied Section 3, of Rule 17 of the Rules of Court. Section 3 states:

Sec. 3. Failure to prosecute. - If plaintiff fails to appear at the time of the trial, or to prosecute his action for an unreasonable length of time, or to comply with these rules or any order of the court, the action may be dismissed upon motion of the defendant or upon the court's own motion. This dismissal shall have the effect of an adjudication upon the merits, unless otherwise provided by the court.

Undoubtedly, in the present case, five years have been an unreasonably long time for a defendant to wait for the outcome of a trial which has yet to commence and on which his family, fortune and future depend. In a number of previous cases, we have consistently warned that courts must ensure that litigations are prosecuted and resolved with dispatch. We also held that although the grant or denial of postponements rests entirely on the sound discretion of the judge, we cautioned that the exercise of that discretion must be reasonably and wisely exercised. Postponements should not be allowed except on meritorious grounds, in light of the attendant circumstances. Deferment of the proceedings may be allowed or tolerated especially where the deferment would cause no substantial prejudice to any party. "The desideratum of a speedy disposition of cases should not, if at all possible, result in the precipitate loss of a party's right to present evidence and either in the plaintiff's being non-suited or of the defendant's being pronounced liable under an ex-parte judgment." [8] While a court can dismiss a case on the ground of non-prosequitur, the real test for the exercise of such power is whether, under the circumstances, plaintiff is chargeable with want of due diligence in failing to proceed with reasonable promptitude. [9]

Recall that here the complaint was filed on December 9, 1988. In two years and four months, the court issued a writ of attachment, upon application of petitioner, recalled the writ, then, only on April 27, 1990, when petitioner moved for reinstatement of the writ, did the court observe that there were no returns of the service of summonses to three other defendants. Without any manifestation from either parties, nor any application for service of summonses by publication, the trial court appropriately ruled to defer deliberations on the motion to reinstate the writ of attachment until the summonses were served. When Kho moved that pre-trial be set without having to await for the service of summonses upon the other respondents, the court again correctly ruled to deny the motion. It was only on July 6, 1990, that petitioner filed a motion for service of summons by publication.

Although Section 1, Rule 14 [10] of the Rules, imposes upon the clerk of court the duty to serve summons, this does not relieve the plaintiff of his own duty to prosecute the case diligently. If the clerk had been negligent, it was plaintiff's duty to call the court's attention to that fact. The non-performance of that duty by plaintiff is an express ground for dismissing an action. If there were no means of summoning any of the defendants, plaintiffs should have so informed the court and moved for their exclusion from the complaint, within a reasonable period of time, so that the case could be disposed of one way or another and the administration of justice would not suffer delay. Plaintiffs should have asked that the defendants be summoned by publication at the earliest possible time. [11] In this case, it was not petitioner who called the court's attention that summons had not been served on the other defendants, it was private respondent Kho who did. The bank was aware, as early as June 7, 1989, after the first order to serve summonses was issued, the summonses could not be served on the three other defendants. It was already aware then that the corporation was already dissolved and Lan Shing Chin and Shin May Wan were reportedly in Hongkong. It took more than one year, before the bank acted and applied for service of summons by publication.

There was also inordinate delay during pre-trial, primarily caused by petitioner. In four instances, specifically on

August 3, 1991, September 17, 1991, May 8, 1992, and July 13, 1992, pre-trial conferences were re-set either because petitioner bank's counsel for witnesses could not appear. Finally, when trial commenced, in fact even before it did, petitioner moved for postponements, in all, three times.

Respondent Kho, while indeed asking for the longer postponement, was understandably constrained to ask for re-setting only because his calendar had been so disrupted by the constant earlier postponements upon motions of petitioner.

In numerous instances, this court refused to disturb orders of dismissal for failure to prosecute. Some dismissals were ordered because of delays for a period of four years,[12] or even less.[13] Given the circumstances elucidated above, we hold that the appellate court did not err nor abuse its discretion when it upheld the trial court's dismissal of the complaint for failure to prosecute for five years.

Lastly, petitioner takes issue against the Court of Appeals' holding that the dismissal for failure to prosecute should be without prejudice to filing the case anew. Section 3 of Rule 17 is clear that the dismissal of an action for failure to prosecute shall have the effect of adjudication on the merits, unless otherwise provided by the court.[14]

By way of exception to the rule that a dismissal on the ground of failure to prosecute under Section 3 of Rule 17 is a dismissal with prejudice, *Delos Reyes v. Capule*, 102 Phil 467 (1957), held that in a case not tried on the merits and whose dismissal was due to the negligence of counsel rather than the plaintiff, in the interest of justice, the dismissal of the case should be decreed to be without prejudice to the filing of a new action. However, unlike *De los Reyes*, the present case involves as plaintiff/petitioner a prominent bank, that employs a staff of lawyers and possesses significant resources. It cannot plead paucity of means, including legal talent it could retain. Petitioner's counsel inexplicably failed to secure the presence of witnesses when required, failed to appear during pre-trial and trial duly set, failed to seasonably appeal, failed to timely move for reconsideration, failed to brief his substitute lawyer; and failed to diligently pursue the service of summonses. These are acts of negligence, laxity and truancy which the bank management could have very easily avoided or timely remedied. One's sympathy with the bank and its counsel could not avail against apparent complacency, if not delinquency, in the conduct of a litigation. For failure to diligently pursue its complaint, it trifled with the right of respondent to speedy trial. It also sorely tried the patience of the court and wasted its precious time and attention.

In the light of the foregoing circumstances, to declare the dismissal in this case without prejudice would open the floodgate to possible circumvention of Section 3, Rule 17 of the Rules of Court on dismissal with prejudice for failure to prosecute. It would frustrate the protection against unreasonable delay in the prosecution of cases and violate the constitutional mandate of speedy dispensation of justice which would in time erode the people's confidence in the judiciary. We find that, as held by the trial court and concurred in by the appellate court, the dismissal of petitioner's complaint is with prejudice and should have the effect of adjudication on the merits.

WHEREFORE, the petition is DENIED and the decision of the Court of Appeals dated June 19, 1996 in CA-G.R. CV No. 47166 is AFFIRMED. Costs against petitioner.

SO ORDERED.

Bellosillo, (Chairman), Mendoza, Buena, and De Leon, Jr., JJ., concur.

[1] Records, pp. 1-6.

[2] *Id.* at 12.

[3] *Id.* at 28.

[4] Id. at 34-43.

[5] Id. at 47.

[6] Rollo, p. 38.

[7] Id. at 16.

[8] Padua v. Ericta, et al., 161 SCRA 458, 459 (1988).

[9] Perez v. Perez, 73 SCRA 517, 522-523 (1976).

[10] SECTION 1. Clerk to issue summons.-Upon the filing of the complaint and the payment of the requisite legal fees, the clerk of court shall forthwith issue the corresponding summons to the defendants.

[11] Montejo v. Urotia, 40 SCRA 41, 53 (1971). Citing Smith Bell & Co. v. American President Lines, 94 Phil. 879, 880 (1954).

[12] E.E. Elser, Inc., et al. v. De la Rama Steamship Co., Inc., et al., 94 Phil. 812, 813 (1954); Smith Bell & Co. v. American President Lines, Ltd., supra, at 882.

[13] Montejo v. Urotia, supra at 53.

[14] Gono-Javier v. Court of Appeals, 239 SCRA 593, 601 (1994). Citing Guanzon v. Mapa, 7 SCRA 457, 460 (1963); Insular Veneer, Inc. v. Plan, 73 SCRA 1, 8 (1976).

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